No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY,
a corporation,
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

JAMES A. KENYON, ADAMS SERVICE CO.,
a corporation, F. NORMAN PHELPS
and ALICE PHELPS,
Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
a corporation,
Appellee.

BRIEF FOR APPELLEE LAWRENCE WAREHOUSE COMPANY.

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JURISDICTIONAL STATEMENT.

The original actions below were both civil actions, the amount in controversy in each exceeding $3,000.00 exclusive of interest and costs. Civil Action No. 23171 was commenced by the Defense Supplies Corporation, an agency of the United States in which the Govern-

ment of the United States owned more than one-half of the capital stock, and Civil Action No. 30473 was commenced by the Reconstruction Finance Corporation, an agency of the United States in which the Government of the United States owns more than one-half of the capital stock. Jurisdiction of the District Court was conferred by reason of the amount in controversy and by reason of Sections 1331, 1345 and 1349 of Title 28 of the United States Code.

The present appeal, or appeals, are from a judgment entered against cross-defendants on cross-claims in the above actions, which cross-claims arose out of the same transaction and were ancillary to the complaints of Defense Supplies Corporation and Reconstruction Finance Corporation. This Court has jurisdiction on appeal under Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE.

This litigation arose from a fire which, on April 9, 1943 (more than ten years ago), destroyed certain tires and tubes belonging to the Defense Supplies Corporation, a governmental agency. Prior to the present appeal (or appeals) the litigation has twice been before the District Court, once before this Court, and once before the Supreme Court of the United States. In appellee's submission the present appeal is utterly devoid of merit, being based almost entirely upon alleged procedural errors of little sub-

stance. The character of the litigation and of this appeal is such as to require a somewhat more extended statement of the case than is usual in an appellee's brief.

A. THE FACTS.

1. As to the occurrences and the litigation.

In the fall of 1942 Defense Supplies Corporation (a federal corporation wholly owned by the United States Government) commenced the so-called "Idle Tire Program," for the collection of surplus tires and tubes from citizens all over the United States. Appellee Lawrence Warehouse Company was appointed government custodian in the California area for this program, with independent agents in various communities for the actual collection and storage of tires. The contract between Defense Supplies and Lawrence stated that Lawrence's responsibility for the care and protection of the tires was limited to the ordinary care of a warehouseman under California law. (Tr. 314 in 11418.) Appellant Capitol Chevrolet Company was the independent agent for the Sacramento area and on October 1, 1942 entered into an "Agency Agreement with Government Custodian" with Lawrence. (Tr. 341 in 11418.) In this agreement Capitol, among other things, agreed "to store and safeguard the storage of such tires and tubes as are received by Agent" and "to indemnify the Principal against loss or damage resulting from

the failure on the part of the Agent to perform any of the duties or obligations above set forth."

Under the program and this agreement Capitol received a great many more tires than anticipated, requiring storage in some eleven separate locations. (Tr. 110 in 11418.) It was determined to consolidate those tires in a single location, and after conferences between representatives of Defense Supplies, Lawrence and Capitol a structure known as the Ice Palace, located in West Sacramento, was selected for the consolidation. (Tr. 111 in 11418.) On March 1, 1943 Defense Supplies and Lawrence entered into a new agreement (in the same form) for the storage of the tires in the Ice Palace (Tr. 310 in 11418), and on the same date Capitol entered into a lease of the building from its owners (Tr. 321 in 11418). Capitol thereupon commenced consolidating the tires in that location. (Tr. 110 in 11418.) At the request of Defense Supplies for a 24-hour watchman service for the Ice Palace, Lawrence contracted with the Burns Detective Agency to furnish such service; the Burns Detective Agency was paid for this service by Lawrence, which in turn was reimbursed by Defense Supplies. (Tr. 285-286 in 11418.)

Defense Supplies had instructed Capitol to permit no one to enter any of the warehouses without authorization from Defense Supplies (Tr. 192, 339 in 11418) and had furnished Capitol a list of persons so authorized (Tr. 340 in 11418). Contrary to these instructions, Capitol permitted one McGrew to enter the

premises (Tr. 185-187 in 11418) and as a result of his use of a metal-cutting torch therein on April 9, 1943, a fire was caused which totally destroyed the building and the tires and tubes therein (Tr. 220-222, 345-349 in 11418).

Thereafter, on February 16, 1944, Defense Supplies brought suit (No. 23171G) against Lawrence, Capitol, McGrew, and the owners of the building, for the loss occasioned by the fire. (Tr. 3 in 11418.) In this action Capitol filed a cross claim against the owners of the building (Tr. 10 in 11418), and Lawrence filed a cross-claim against Capitol and against the owners of the building (Tr. 38 in 11418). The case proceeded to trial on the complaint and on January 9, 1946 the Court ordered judgment for Defense Supplies against Lawrence, Capitol and McGrew, specifically retaining jurisdiction to determine the issues of the various cross claims at a later date. (*Defense Supplies Corporation v. Lawrence Warehouse Co., et al.,* 67 Fed. Supp. 16.) Judgment was also ordered in favor of Clyde W. Henry, one of the owners of the building, the action having been previously dismissed on motion as to the other defendants. Written findings of fact and conclusions of law were filed on April 15, 1946 (Tr. 77 in 11418) and judgment was entered on that date (Tr. 83 in 11418).

An appeal was taken to this Court by both Capitol and Lawrence, and on December 5, 1947 this Court affirmed the judgment. (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 164 Fed. 2d 773.) Sub-

sequently, on motion of Capitol and Lawrence, this Court set aside its judgment of affirmance and the judgment of the District Court, and ordered the case remanded to the District Court with instructions to enter an order dismissing the action. (*Lawrence Warehouse Co. v. Defense Supplies Corporation,* 168 Fed. 2d 199.) The ground of the motion and of this Court's decision was that Defense Supplies Corporation had been dissolved prior to the entry of judgment and no substitution had been made and that consequently the District Court lost its jurisdiction. On petition for certiorari the Supreme Court vacated the judgment of this Court and remanded the case with instructions to dismiss the appeal. (*Defense Supplies Corporation v. Lawrence Warehouse Co.,* 336 U.S. 631, 93 L.Ed. 931 (1949).) The Supreme Court in its decision held that the appeal had abated by reason of the dissolution of Defense Supplies, but that the judgment in favor of Defense Supplies was valid when entered. The Supreme Court further stated that Reconstruction Finance Corporation (as successor in interest to Defense Supplies) could, as the real party in interest, bring action on the judgment.

Reconstruction Finance Corporation thereupon, on April 12, 1951, brought suit on the judgment (No. 30473) against Capitol, Lawrence, McGrew and certain successor interests of Capitol (which had been dissolved in the course of the litigation). (Tr. 38 in 13840.) Lawrence filed a cross claim against Capitol

and its successors. (Tr. 54 in 13840.) On November 21, 1951, on motion for summary judgment, a separate judgment was entered in favor of R.F.C. against Capitol, Lawrence and McGrew (Tr. 81 in 13840), and on December 1, 1951 Lawrence paid to Reconstruction Finance Corporation the sum of $58,859.90, the full amount of that judgment (Tr. 96 in 13840).

Subsequently, on February 15, 1952, Lawrence amended its cross-claim to join certain additional successor interests of Capitol (Tr. 113 in 13840) and on March 4, 1952 the District Court entered its order consolidating for trial the cross-claims of Lawrence in both actions (Tr. 18 in 13840). On March 6, 1952 the consolidated trial of Lawrence's cross claims was held. (Tr. 307 in 13840.) On September 12, 1952 the District Court's Order for Judgment was entered, directing judgment in favor of Lawrence against Capitol in No. 23,171, and against James A. Kenyon and Adams Service Co. (two of the successors of Capitol) in No. 30,473 (Tr. 24 in 13840). On January 15, 1953 the Court entered its Order Amending Order for Judgment, ordering that judgment also be given in No. 30,473 in favor of Lawrence against F. Norman Phelps and Alice Phelps, two additional successors of Capitol. (Tr. 30 in 13840.) The Court's consolidated Findings of Fact and Conclusions of Law were filed February 11, 1953 (Tr. 117 in 13840) and a single consolidated judgment was filed on that date and entered on February 12, 1953 (Tr. 131 in 13840). Judgment was for a total amount of $76,269.73 in

favor of Lawrence against Capitol in No. 23,171, and against Kenyon, Adams Service Co., and the Phelps in No. 30,473. The judgment also ordered Lawrence's cross claims dismissed in No. 30,473 as to Capitol and two of its successor interests, Capitol Chevrolet Co. and J.A.K. Co.

A separate notice of appeal (designated in No. 23171) was filed by Capitol on March 10, 1953 (Tr. 33 in 13840), and a further separate notice of appeal (in No. 30,473) was filed by Kenyon, Adams, and the Phelps on the same date (Tr. 179 in 13840). On April 15, 1953 the District Court ordered that a single record on appeal be prepared for the several appeals involved. (Tr. 191 in 13840.)

2. As to appellant Capitol Chevrolet Company and its successors in interest.

In view of certain contentions raised by appellants in this case, we deem it proper and necessary to invite the Court's attention to the following undisputed facts regarding the relationship between appellant Capitol Chevrolet Company and its successors in interest.

Appellant Capitol Chevrolet Company was a California corporation originally incorporated in May, 1936. (Tr. 376 in 13840.) On October 1, 1942, at the time Capitol entered into its agency agreement with Lawrence and from then until its subsequent dissolution, its sole stockholders were appellants James A. Kenyon and Adams Service Co., the stock being

equally divided between these two appellants. (Tr. 107 in 13840.) Adams Service Co. at this time was a Nevada corporation wholly owned by appellants F. Norman Phelps and Alice Phelps. Appellants Phelps at all times dealt with the property of Adams as if it were their own individually.

Capitol was subsequently dissolved, its certificate of election to dissolve being signed on June 1, 1943 and filed with the Secretary of State on June 21, 1943 (Tr. 357 in 13840). On May 31, 1943, Kenyon and Adams assumed and agreed to pay all of the debts, liabilities and obligations of Capitol. (Tr. 162 in 13840.) On December 31, 1943 Capitol's Certificate of Winding Up and Dissolution was executed, which was filed with the Secretary of State on June 5, 1944. (Tr. 358 in 13840.) All of the assets of Capitol were distributed to its stockholders Kenyon and Adams.

Capitol's business was thereafter carried on as a partnership under the same name, the partners being Kenyon and Adams, who contributed to the partnership the assets which they had received from the corporation. (Tr. 160 in 13840.)

On or about April 1, 1946, a new corporation under the name of Capitol Chevrolet Co. was formed which continued the business of the partnership. Its stock was originally issued to Kenyon as trustee of a trust for his daughter, to J.A.K. Co., a Nevada corporation wholly owned by Kenyon, and to F. Norman Phelps and Alice Phelps, the sole stockholders of Adams.

B. THE ISSUES.

This is essentially a very simple case. Appellee Lawrence sought in its cross-claims to be reimbursed by its agent Capitol and the latter's successors in interest for sums which Lawrence as principal might be compelled to pay to a third party on account of its agent's negligence. The only real issues presented to the District Court were whether Lawrence had been held liable on account of its own or on account of its agent Capitol's negligence; and, secondarily, whether Capitol's successors in interest were responsible for its liability.

The simplicity of the case and the real issues presented have been obscured by several factors: first, by the devious course which this protracted litigation has taken; second, by the many changes of business form of Capitol and its owners; and thirdly, by the ingenuity of appellants' counsel in presenting spurious special defenses and relying upon alleged procedural errors of an insubstantial character. For example, Capitol's original answer to the cross-claim in No. 23171 contained a general denial and three special defenses; appellant's present counsel expanded these defenses to eight. (Tr. 10 in 13840.) The answers to the cross-claim filed in No. 30473 contained general denials and ten separate special defenses to each of appellee's two causes of action. (Tr. 98 in 13840.) Six different statutes of limitation were pleaded as special defenses, including periods from six months to five years; the applicability of such scattered de-

fenses seems more than dubious and it is to be noted that appellants have now abandoned them (along with many other contentions) with the exception of one obscure theory involving an alleged "anticipatory breach."

Similarly, counsel for appellants have continually raised new points (largely procedural), urged them with apparent sincerity, and then abandoned them. As an example, we cite the endorsement made by counsel upon the judgment appealed from:

> "Not approved as to form this 29th day of January, 1953, because a separate judgment should be rendered, entered and filed in each of the above-numbered actions and because, further,
>
> So far as we are aware Adams Service Co. was not and is not a party to either action." (Tr. 133 in 13840.)

It is to be noted that both of these contentions have been abandoned, one sub silentio and the other expressly. We believe the comment of the District Court (in its Memorandum of Court upon Signing of Judgment) with respect to this now abandoned objection with regard to appellant Adams is pertinent to the bulk of the errors urged on this appeal.

> "The contention of its attorneys to the contrary at this stage of the proceedings is frivolous." (Tr. 136 in 13840.)

As we have previously stated, the present appeal is almost entirely based upon alleged procedural errors of little substance. These alleged errors stem largely

from the course of the litigation (in two separate suits) as directed by the Supreme Court. Counsel for appellants have endeavored to stretch this bifurcation in every way and have endeavored to divorce and isolate appellants from each other. Separate briefs have been filed on behalf of Capitol and the other appellants, and a continuous effort has been made to indicate a complete separation of interests.

In substance, however, appellants have at all times during this litigation and the occurrences out of which it arose been in complete privity with a complete identity of interest. In substance, furthermore, the two separate suits have constituted a single litigation, arising from the same occurrences, involving the same parties, consolidated for trial as to the cross-claims, and heard and tried on all occasions by the same district judge.

In this single brief filed on behalf of appellee we propose to answer the separate briefs filed by Capitol and by its successor interests. We propose to demonstrate that the judgment against both Capitol and its successor interests, indemnifying Lawrence as principal for a loss suffered by reason of the negligence of its agent Capitol, was entirely proper. We do not propose to unduly extend this brief or burden the Court by a full answer herein to the numerous contentions of appellants. We will dispose of those which appear to have at least some substance; the more insubstantial will be dealt with in the Appendix to this brief.

SUMMARY OF ARGUMENT.

A. The points raised on behalf of appellant Capitol Chevrolet Company.

I. Appellants' "suggestion" that appellant Capitol's appeal was untimely and might be dismissed.

II. Lawrence was entitled to recover from Capitol for loss occasioned by the negligence of Capitol.

III. Lawrence was not bound with respect to its cross-claim against Capitol by the language of the judgment, findings, and conclusions on the complaint of Defense Supplies.

IV. The evidence adduced at the trial of the complaint of Defense Supplies was in evidence for all purposes, including the trial of the cross-claims.

V. Capitol's contention that Lawrence failed to prove loss or damage.

B. The points raised on behalf of appellants James A. Kenyon, Adams Service Co., F. Norman Phelps, and Alice Phelps.

I. Appellee Lawrence Warehouse Company was entitled to recover from appellants Kenyon, Adams and the Phelps as successors to appellant Capitol.

II. The evidence sustains the judgment, findings and conclusions in favor of Lawrence against appellants Kenyon et al.

a. The evidence to sustain the judgment.

b. Appellants Kenyon et al. were in complete privity with Capitol and are bound by the judgment against Capitol.

c. The judgment is binding upon appellants regardless of form.

III. The contentions respecting Lawrence's contributory negligence, etc.

IV. Lawrence's cross-claim was not barred by the Statute of Limitations.

V. Lawrence's loss and damage.

ARGUMENT.

A. THE POINTS RAISED ON BEHALF OF APPELLANT CAPITOL CHEVROLET CO.

I. APPELLANTS' "SUGGESTION" THAT APPELLANT CAPITOL'S APPEAL WAS UNTIMELY AND MIGHT BE DISMISSED.

Counsel for appellants "suggest" that the appeal of appellant Capitol might be dismissed because there was no express determination that there was no just reason for delay in entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure. It is to be noted that the District Court in its order for judgment did make an express direction for entry of the judgment. (Tr. 29 in 13840.)

Surprising though it is to find an appellant "suggesting" that its own appeal might be dismissed, it is even more surprising to find an appellant wholly failing to argue against such a dismissal. It is apparent, however, that counsel for appellants hope to derive some procedural or technical advantage from a dismissal, asserting that a dismissal of the appeal of appellant Capitol would result in a reversal of

the judgment as to the other appellants. This latter contention is wholly fallacious, and will be dealt with later in this brief (pages 49-52). For the moment we only wish to observe that if counsel have any honest doubt as to the propriety of Capitol's appeal or any honest conviction as to the effect of dismissing it, a voluntary dismissal of the appeal is always available to them.

With respect to the merits of counsel's somewhat unusual contention, we would point out that the District Court rendered a single judgment (Tr. 131-133 in 13840), and that the order pursuant to rule 54(b) (Tr. 179 in 13840) refers to that judgment, although entitled by counsel only in No. 30473. Counsel for appellants filed separate notices of appeal for Capitol and its successors shortly after they had had the above order signed, and it is apparent that they either believed the order applied to the judgment as a whole, or that they had no serious hope of reversing the judgment on the merits as to appellant Capitol and hoped to create some further technical ground for urging reversal as to the other appellants.

In view of this obvious procedural pettifogging we at least share counsel's "unresolved doubt" as to the propriety of the appeal, although perhaps on somewhat different grounds. We are forced, however, to consider the points urged on behalf of appellant Capitol, since it is easily demonstrable that the judgment in favor of appellee must be affirmed.

II. LAWRENCE WAS ENTITLED TO RECOVER FROM CAPITOL FOR LOSS OCCASIONED BY THE NEGLIGENCE OF CAPITOL.

Counsel have devoted some thirty pages in the brief filed on behalf of appellant Capitol (p. 20-50 of brief for Capitol) to the contention that the evidence precluded recovery by Lawrence against Capitol. This argument includes a somewhat inaccurate and incomplete statement of the law of indemnity (p. 20-24), a contention that Capitol's negligence was known to and directed by Lawrence (p. 24-42), and a contention that Lawrence was independently negligent (p. 42-50). These contentions would seem to be foreclosed by the findings of fact of the District Court and the clear evidence in support thereof, but since these are the only arguments advanced by counsel in either brief which appear to be upon the merits (as distinguished from procedural hypertechnicalities), they must be here considered.

Appellee Lawrence has at all times contended, and the District Court found, that Lawrence was held liable to Defense Supplies (and its successor Reconstruction Finance) solely upon a basis of respondeat superior on account of the negligence of its agent, appellant Capitol. It is to be noted that this Court (in its subsequently vacated decision) so stated:

> "While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency agreement fully support that conclusion." (164 Fed. (2d) 773 at 776.)

Since Lawrence's liability was based on imputed negligence of its agent Capitol, Lawrence has at all times contended, and the District Court held, that Lawrence was entitled to indemnity from Capitol. (Appellants Kenyon and Adams expressly assumed Capitol's liabilities upon its dissolution, and no longer contend (except upon procedural grounds) that they are not liable if Capitol is liable. The Phelps concededly are responsible for the liability of Adams as their corporate alter ego.)

There can be no doubt that Lawrence was entitled to recover from Capitol for loss resulting from the negligence of Capitol as its agent. Independently of the written agency agreement of October 1, 1942 (Tr. 341 in 11418), the rule of law is undisputed that a principal is entitled to indemnity from its agent for loss resulting from the principal's liability to a third person on account of the negligence of its agent.

Bradley v. Rosenthal, 154 Cal. 420, 423, 97 Pac. 875 (1908);

Johnston v. City of San Fernando, 35 Cal. App. (2d) 244, 246, 95 Pac. (2d) 147 (1939);

United Pacific Ins. Co. v. Ohio Casualty Ins. Co., 172 Fed. (2d) 836 (U.S.C.A. 9th, 1949) (at p. 840, footnote 5);

42 *Corpus Juris Secundum,* 596-8;

See Note 38 A.L.R. 566.

This undisputed rule of law is reinforced in this case by the terms of the agency agreement of October

1, 1942, in which Capitol agreed (paragraph 8, Tr. 343 in 11418):

> "To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth."

Among the duties or obligations of Capitol referred to was its agreement under paragraph 3 of the contract: "To store and safeguard the storage of such tires and tubes as are received by Agent". (Tr. 342 in 11418.)

Counsel for appellants do not apparently contradict this rule of law or the above facts. They do, however, assert, first, that Lawrence knew of and directed Capitol's negligence, and second, that Lawrence was independently negligent. Both of these contentions are contrary to the District Court's findings, and cannot be here considered unless there is a total lack of evidence to support the findings. It is elementary and, we think, not disputed even by counsel, that a District Court's findings of fact, made upon conflicting evidence or supported by evidence, may not be reversed or disregarded by this Court.

Counsel devote eighteen pages (p. 24-42 of Brief for Capitol) to a purported review of some of the evidence in an effort to demonstrate that the District Court's findings are "clearly erroneous". Nowhere in this discursive argument do counsel state specifically which finding they deem unsupported by the evidence but attack a large group generally upon that ground.

The entire argument is apparently based upon the false premise that this Court must disregard the findings and reexamine all of the evidence to see if contrary findings might have been made. Such, we submit, is not the function or the duty of this Court upon this appeal.

E. R. Squibb & Sons v. Mallinckrodt Chemical Works, 69 Fed. (2d) 685 (C.C.A. 8th, 1934); affd. 293 U.S. 190; Cert. denied 295 U.S. 759;

National Surety Co. v. Globe Grain & Milling Co., 256 Fed. 601 (C.C.A. 9th, 1919);

Remington Rand, Inc. v. Societe Internationale, 188 Fed. (2d) 1011 (C.A., D.C., 1951); cert. denied 342 U.S. 832, 96 L.Ed. 630.

Counsel in their Specification of Errors (p. 12 Brief for Capitol) charge that the judgment, findings of fact Nos. V, VI, VII, XIII, XVII, XVIII, XIX, XX, XXII and XXIII, and conclusions of law Nos. I and II are unsupported by the evidence and are "clearly erroneous". In their argument, however, counsel never point out specifically which finding is deemed objectionable, or why, but are content to make a general argument upon portions of the evidence. This general argument has already been thrice made and thrice rejected, first in the District Court upon the original trial (67 Fed Supp 16), next in this Court upon the original appeal (164 Fed (2d) 773), and thirdly in the Court below (Tr. p. 24-30 in 13840). It is here re-asserted to support a contention that Lawrence knew of and directed Capitol's negli-

gence, but in its essence it amounts to an argument that Capitol (the actual custodian of the tires which permitted McGrew to enter and use the welding torch) had neither possession nor the responsibility for the property stored in its warehouse. In answer we take the liberty of quoting from the brief of Defense Supplies on the original appeal and adopting the language as our own:

> "Capitol's position is a unique one. It had agreed to store and safeguard the goods, and now seeks to avoid liability on the ground that it was not storing the goods at all because it had no control over the premises. One is tempted to ask, 'What was Capitol being paid for?' "

This Court on the original appeal rejected Capitol's argument in its entirety.

> "We turn now to special circumstances. One of them relates to the fact that the Corporation approved the selection of the Ice Palace as a place of storage. We may assume that the approval would relieve the warehousemen had some known defect in the premises been the cause of the loss. But such is not thought to be the situation here. The loss resulted from the use of the acetylene torch; and the record is devoid of intimation that the Corporation approved its use, or had knowledge of the failure of the warehouseman to take reasonable precautions to safeguard the property from hazards that might naturally be expected to flow from the use of such an instrumenality.
>
> Another circumstance relates to the status of Kissell, the guard on duty while McGrew was at

work. This man was an employee of the Burns Detective Agency. In the course of the trial it was stipulated that the Corporation requested the establishment of a twenty-four hour guard service, and that in compliance with the request Lawrence, with the Corporation's assent, employed the Burns Detective Agency, and paid them; that the corporation reimbursed Lawrence. On the strength of this arrangement Capitol appears to argue that the premises were not in its custody but were in the joint custodianship of Lawrence and the Corporation. It attempts to saddle the responsibility elsewhere on the further ground that Kissell, who was not its employee, saw McGrew working with the torch and did nothing about it. There are several answers to this line of argument. To begin with, the disclaimer of custodianship is at loggerheads with Capitol's conduct and with the terms of its written contract with Lawrence. Again, the stipulated facts are insufficient to support an inference that the Burns Agency or the guard was an employee of the Corporation. Moreover, it was Capitol, not the guard, who permitted McGrew to enter and pursue his work in the building. Kissell's presence did not preclude vigilance on Capitol's part or, indeed, render its exercise any the less imperative since Kissell acted in the matter under Capitol's directions and had no apparent reason to suppose that McGrew's use of the torch was unauthorized."

164 Fed. (2d) 773 at 776-7.

This Court's statement is equally applicable when considered on behalf of Lawrence here. A close and studious examination of counsel's argument (p. 24-42

of Brief for Capitol) discloses that they are apparently arguing that Capitol's only negligence was in using the Ice Palace as a place of storage and that this was known to and directed by Lawrence. Certainly it was known to Lawrence, but it was also known to Defense Supplies and hence could not have been the basis for the judgment for Defense Supplies. In truth, the negligence was the admission of McGrew, unknown both to Defense Supplies and to Lawrence. This Court already so indicated on the first appeal, and the District Court in its present findings so found.

"V.

"That on or about April 9, 1943, while tires and tubes belonging to plaintiff Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said 'Ice Palace' and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to maintain adequate safeguards against fire. That said V. J. McGrew employed a torch in said engine and boiler room and in consequence of the negligent use thereof and in consequence of the negligence of cross-defendant, Capitol Chevrolet Company, in failing to ascertain his intentions and prevent the use of said torch in view of the hazard involved and the lack of fire fighting equipment, and its negligence in failing to maintain adequate safeguards against fire, a fire broke out and said 'Ice Palace' and said tires and tubes were wholly destroyed and consumed by said fire." (Tr. 119-120 in 13840.)

There is certainly no word of evidence in the record that Lawrence knew of or directed the entry of McGrew. The finding that Capitol permitted the entry is amply supported by the evidence. Gordon Kenyon, the assistant manager of Capitol, flatly admitted that he gave permission for the entry. (Tr. 186-7 in 11418.) Counsel now argue that this testimony of Capitol's own employee must be disregarded on appeal because "he was in error". (p. 38 of brief for Capitol.) This novel argument is not only ingenious but ingenuous, and requires no consideration. Additionally the watchman Kissell testified flatly that he permitted McGrew in because of a written order from Capitol, which order was later destroyed in the fire.

"Q. Do you recall on April 9, 1943, seeing some workmen working in the engine room of the Ice Palace?

A. Yes.

Q. Did you permit them to go in there?

A. They had a permit, I did not do the permitting; that is, there was an order left there for them to go to work. I did not stop them. I allowed them to go to work that morning.

Q. What time did you go on duty?

A. At eight o'clock.

Q. Were they working when you came on duty?

A. Yes, they were.

Q. You say there was an order. What do you mean by that?

A. There was an order came from the Capitol Chevrolet Company permitting Mr. Henry to remove this stuff from the engine room.

Q. Did that appear in your book of instructions, or whatever you kept there?

A. That was our orders, not to let anything be moved from the premises unless there was an order from the Capitol Chevrolet Company." (Tr. 280 in 11418.)

"Q. As far as you know, there were some instructions given but these instructions were not given to you?

A. They were not given to me personally, no.

Q. You did not see any written instructions of the Capitol Chevrolet Company?

A. Yes, I did.

Q. Did you yourself?

A. Yes.

Q. Have you got them?

A. No, I have not. They burned up in the fire.

Q. Burned up in the fire?

A. Yes.

Q. Was that in the form of a card?

A. Yes, a card, that there would be men there in order to take that steel our of the engine room. That was all there was to it.

Q. That is your recollection at this time. Isn't it true that the card stated that Mr. Sanchez was authorized to enter the Ice Palace for the purpose of removing some pipe and equipment?

A. Well, it was not the Ice Palace; it was the engine room. There was nothing said about entering the inside of the Ice Palace on the card.

Q. You were sure it said something about the engine room, that the card said that?

A. Yes.

Q. When did you see that card?

A. I think it was the day before the fire.
Q. The day before the fire.
A. Yes." (Tr. 287 in 11418.)

We submit that the finding of the District Court that Capitol negligently permitted McGrew to enter the premises and that that negligence caused the fire is amply supported by the evidence. We submit further that the findings of the District Court that Lawrence neither knew of nor directed this entry are undisputed and that appellants' argument is without validity.

The second (and last) argument made by counsel upon the merits is that Lawrence was independently and actively negligent. (p. 42-50 of brief for Capitol.) Here again the findings, supported by the evidence, are to the contrary, and the entire argument has in effect been answered above.

Counsel suggest that the finding (finding XIII, Tr. 125 in 13840) is not express; we would point out that it is definite and express as to the issue tendered by appellant Capitol in its first amended answer to cross-claim. (Tr. 14 in 13840.) The District Court found that Lawrence was not negligent. Counsel seek to find negligence on the part of Lawrence on a theory that because of the employment of independent guards for the Ice Palace, Capitol no longer had a duty to safeguard the tires and had relinquished that duty to Lawrence. This argument is fully disposed of above. It may be further answered by pointing out again that Capitol was actually in possession of and operating

the warehouse. The instructions as to who might enter were given in writing by Defense Supplies to Capitol. (Tr. 192 in 11418.) Gordon Kenyon, assistant manager of Capitol testified:

> "Q. After the Ice Palace was leased was any person other than the ones mentioned here authorized to enter any of the buildings by the Defense Supplies Corporation?
>
> A. Not other than the list that we had agreed on.
>
> Q. You had agreed upon a list with someone from the Defense Supplies Corporation?
>
> A. Mr. Baxter and Mr. Anderson.
>
> Q. Mr. Baxter was the field representative for the Defense Supplies Corporation, and your contact with the Defense Supplies Corporation in obtaining the Ice Palace, the leasing of it?
>
> A. Yes." (Tr. 193 in 11418.)

The watchman refused to admit any one in to remove the equipment (letter of James Kenyon, Tr. 346 in 11418) without authority. Capitol then gave written instructions to allow the men to enter to remove the equipment. (Tr. 280, 286-7 in 11418.)

To assert, as counsel now do, that Lawrence was negligent because of the presence of independent guards, hired at the request of Defense Supplies, is to ask this Court to disregard the findings and the evidence supporting them. It is quite clear that the guards were independent contractors, requested by Defense Supplies and paid for by Defense Supplies through Lawrence. It is also abundantly clear that Capitol never relinquished its duties as actual cus-

todian and cannot now assert to the contrary. The finding is clear that Lawrence was not negligent and that finding is supported by the evidence.

It is submitted that on the evidence Lawrence was entitled to be indemnified by its agent Capitol for loss occasioned by the latter's negligence. The District Court so found. Appellants' attack upon the findings cannot be sustained, and it is submitted that it is not within the province of this Court to weigh the evidence and redetermine the questions of negligence and contributory negligence, both of which are questions of fact.

III. LAWRENCE WAS NOT BOUND WITH RESPECT TO ITS CROSS-CLAIM AGAINST CAPITOL BY THE LANGUAGE OF THE JUDGMENT, FINDINGS, AND CONCLUSIONS ON THE COMPLAINT OF DEFENSE SUPPLIES.

We pass now from the only contentions of appellants upon the merits of the action, and turn to a consideration of the multitudinous charges of procedural error made by counsel in the separate briefs which they have filed on behalf of appellant Capitol and the other appellants. As we have stated before, none of these points are of substantial merit and many of them seem even frivolous. We will endeavor to dispose of them with brevity herein, including a somewhat more detailed discussion of some of them in the appendix to this brief should this Court desire a fuller answer than we feel proper in this brief itself.

The first of these points is urged in the brief filed for appellant Capitol at pages 50 to 57 and repeated

in the brief filed for the other appellants at pages 44 to 48. Briefly stated, this point is that, by reason of the language used in the judgment (Tr. 83-4 in 11418) and in the findings of fact and conclusions of law (Tr. 77-82 in 11418) in favor of Defense Supplies upon its complaint, Lawrence was bound (upon some theory of res judicata or estoppel by judgment) from denying its own negligence in presenting its cross-claim against Capitol. This point and the next point urged (pages 57 to 66 of Brief for Capitol), to the effect that the District Court could not, upon the trial of the cross-claim, consider evidence adduced at the trial of the complaint, are based upon a fundamental misconception or misunderstanding of present Federal procedure.

The complaint of Defense Supplies was against Capitol, Lawrence, McGrew and the owners of the building (Tr. 3 in 11418), and both Lawrence and Capitol filed cross-claims, that of Lawrence being against Capitol and the owners of the building (Tr. 38 in 11418) and that of Capitol being against the owners of the building alone. (Tr. 10 in 11418.) The case proceeded to trial upon the complaint and the District Court, in its Opinion and Order for Judgment, at the specific request of all counsel, ordered:

> "The court will retain jurisdiction to determine the issues of the cross-actions, if the parties therein concerned determine to pursue the same." (Tr. 75 in 11418.)

The District Court's power to enter such an order was specifically provided under Rule 54(b) of the

Federal Rules of Civil Procedure, which read as follows at the time (prior to the 1948 amendment thereof):

> "When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

There can be no doubt but that the District Court, in entering judgment in favor of Defense Supplies, never intended to pass upon the merits of any of the cross-claims then pending in the action. There was no attempt in the judgment, findings, conclusions, order for judgment and opinion to make any disposition whatsoever of the various pending cross-claims, which were expressly reserved for later determination. Counsel now assert, however, that the District Court, having expressly reserved the issues of the cross-claims for later determination, was foreclosed from determining those issues on the evidence before it because of the wording of its judgment and findings in

favor of Defense Supplies. Counsel assert that the evidence was merged in the judgment and that the wording of the judgment conclusively proves active negligence on the part of Lawrence.

This surprising assertion was summarily rejected by the District Court. (Findings Nos. XV and XVI, Tr. 125-6 in 13840.) Counsel's contention is stated at length in their brief for Capitol (pages 50-57) and is compounded of elements of res judicata, estoppel by judgment and judicial merger. It proceeds upon the erroneous assumption that Lawrence's right to indemnity from its agent Capitol is based upon and supported only by the judgment in favor of Defense Supplies. In fact, Lawrence's claim to indemnity was not expressed as a suit upon a judgment; it was set out in a cross-claim, on file and at issue long before the entry of the judgment for Defense Supplies.

Counsel repeatedly refer to the hearing on the complaint of Defense Supplies as the former trial or the former action in an effort to validate their arguments and make applicable the authorities cited. We repeat that this was a single action with cross-claims at issue at the time of the former hearing, and with an express reservation of jurisdiction for the trial of those cross-claims.

The judgment, findings of fact and conclusions of law in favor of Lawrence against its indemnitor Capitol rest upon and are supported by the evidence, not upon the judgment in favor of Defense Supplies. The

judgment in favor of Lawrence against the other appellants who expressly assumed Capitol's liabilities, rests upon and is supported by the judgment in favor of Lawrence against Capitol, and not upon the judgment in favor of Defense Supplies. Appellants' entire involved argument based upon the alleged effect of the judgment in favor of Defense Supplies is simply not relevant here. Additionally, their argument is fallacious and contrary to law, but we deem it unnecessary to extend this brief by answering it in detail here. Should this Court consider it to have any relevancy whatsoever, a more detailed consideration and disposition of it will be found in the appendix to this brief (pages i-ix).

IV. THE EVIDENCE ADDUCED AT THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES WAS IN EVIDENCE FOR ALL PURPOSES, INCLUDING THE TRIAL OF THE CROSS-CLAIMS.

Appellant Capitol urges (pages 57 to 66 of Brief for Capitol) that it was error for the District Court to consider on the trial of the cross-claim the evidence already introduced by Defense Supplies to sustain the latter's complaint. This point is wholly and utterly without merit, unsupported by any applicable authority, and entirely at variance with the purpose and scope of the present Federal Rules of Civil Procedure. The only plausibility of the argument, and the only applicability of the authorities cited to support it, is based upon the misconception that the previous hearing upon the complaint of Defense Supplies constituted a *"former trial"*.

Factually and legally that hearing did not constitute a former trial, but was a phase of the same action. The cross-claims were at issue at that time, and jurisdiction was specifically reserved to determine them at a later time. Due to the intervening appellate proceedings the time between the hearings was extended in this case, but legally and in fact the situation is no different than if the parties had proceeded to a determination of the cross-claims on the succeeding day. Under present Federal procedure evidence offered in a consolidated case or where there are cross-claims or third party defendants is in evidence for all purposes.

Rules 13(g), 14, 42(a), 43(a) Federal Rules of Civil Procedure;

Jones v. Waterman S.S. Corp., 155 Fed. (2d) 992, 997 (C.C.A. 3d, 1946);

Metzger v. Breeze Corporations, 37 Fed. Supp. 693, 695 (D.C., N.J., 1941);

See

McClure v. Donovan, 33 Cal. (2d) 717, 722 (1949).

To hold otherwise is to defeat the clear purpose of the Federal Rules of Civil Procedure to avoid multiplicity of suits and unnecessary duplication of testimony.

Appellants' contention was summed up by the learned district judge (Tr. 317-8 in 13840):

> "What you are saying amounts to this: That if it were necessary to determine the rights and liabilities of the parties on these cross-actions,

> that the court would have to hear all this evidence over again and have it re-introduced, and all the documents that were introduced at the other hearings."

It seems clear that such repetition is wholly unnecessary under modern Federal practice, where the cross-claims are asserted in the identical action and are reserved for later determination by the same Court.

The fact that this testimony was in evidence would not preclude any of the parties from introducing further evidence on the trial of the cross-claims, or from recalling witnesses for further examination, or even from objecting to the applicability of specific items of evidence. It does, however, preclude a carte blanche exclusion of all of the evidence, which was what was sought by counsel for appellants here.

It may be pointed out in passing that the question of possible applicability of portions of the evidence was recognized early in the hearing on the complaint of Defense Supplies, when Mr. Wallace, counsel for Lawrence, stated:

> "I think counsel for the plaintiff did not mention in his opening statement that aside from the action of Defense Supplies Corporation against all of the defendants, there is also on file a cross-complaint in which Lawrence Warehouse Company is cross-claimant against Capitol Chevrolet Company, Clyde W. Henry, and Constantine Parella, so that evidence introduced as against one defendant would not necessarily be evidence as against the others." (Tr. 106 in 11418.)

Counsel did not at the hearing on the cross-claim move to strike any specific testimony on the ground of its applicability; they simply moved to exclude the evidence in its entirety. It is submitted that the authorities cited (none of which involve cross-claims but are concerned with evidence in a former trial or action) have no application here and do not support counsel's position. Under the circumstances we feel the cases need not be dealt with in detail.

Counsel assert that appellant Capitol has been deprived of its day in Court. This is apparently based upon some involved theory that Capitol has been estopped to deny its liability over to Lawrence because of the judgment in favor of Defense Supplies. This again is a misconception. At the hearing on the cross-claim against Capitol, Lawrence, justifiably feeling that the evidence previously introduced was sufficient to establish Capitol's liability to Lawrence, relied upon that evidence and found it unnecessary to introduce further evidence on those questions of fact. This did not preclude Capitol from introducing any evidence it saw fit; it could have called or recalled witnesses and added any proper testimony to the record that counsel felt necessary. To assert, in view of the extended course of this litigation, that Capitol has been deprived of its day in Court is to reach the heights of frivolity.

It is additionally urged (pages 64-66 of brief for Capitol) that this evidence was not admissible to show a "true meaning" of the judgment, findings and con-

clusions in favor of Defense Supplies. This contention is apparently based upon some theory of "integration" of the evidence into the judgment in favor of Defense Supplies. It is wholly fallacious here. The judgment here appealed from by appellant Capitol does not rest solely upon that prior judgment; it rests upon the evidence. That evidence was admitted in an action containing both the claim of Defense Supplies and the cross-claims of the defendants. We are unable to see how that evidence is "integrated" into a judgment upon the claim of Defense Supplies alone, when jurisdiction was expressly reserved to try the cross-claims at a later time.

We submit that counsel's entire point with regard to the consideration of the evidence taken earlier was fully answered in the order for judgment of the District Court herein:

> "The contention of Capitol, that the evidence introduced by Defense Supplies Corporation upon the trial of its complaint, cannot be considered in determining the cross-complaint, is without merit, inasmuch as *the trial of the cross-complaint is but another phase of the same action.* Capitol's contention is not supported by the authorities cited." (Emphasis added.) (Tr. 29 in 13840.)

V. CAPITOL'S CONTENTION THAT LAWRENCE FAILED TO PROVE LOSS OR DAMAGE.

The last point urged in the brief filed by counsel on behalf of appellant Capitol is found, upon examination, to be perhaps the most outrageous of the

red herrings drawn into this appeal to avoid the payment of an honest obligation. It is here urged that Lawrence failed to prove *as against Capitol* that it had suffered any loss or damage because (1) the evidence of payment was restricted to Action No. 30473, and (2) because there was no proof in No. 23171 that the judgment in favor of Reconstruction Finance Corporation was based upon the judgment in No. 23171 in favor of Defense Supplies.

These hypertechnical contentions, never raised in the District Court, must be considered with certain basic facts in mind. The charge of error is made by appellant Capitol with regard to an alleged deficiency of proof in one of two cases consolidated for trial, both of which cases arose from the same transaction. Appellant Capitol was a defendant and cross-defendant in both actions, represented by the same counsel. As to one of the two alleged deficiencies of proof (as to payment by Lawrence to R. F. C.), counsel for Capitol stipulated to such payment at least in the second of the two consolidated actions. As to the second of the alleged deficiencies of proof (that the R. F. C. judgment was based upon the Defense Supplies judgment), counsel for Capitol admitted that fact on behalf of Capitol in their pleadings. Furthermore, both of those judgments ran against Capitol as well as against Lawrence.

In the face of these indisputable facts counsel for appellants have the temerity to assert that the record in the consolidated action is defective because Lawrence failed to offer proof of loss or damage in one

of the two numbered actions. They further suggest that there is no rule of law apparent to them whereby the facts might be "judicially noticed".

As to the first asserted deficiency of proof, counsel cite (pages 66-77 of Brief for Capitol) a colloquy between counsel. It will be noted from this that senior counsel for Capitol first stipulated as to payment by Lawrence, and that junior counsel for Capitol also so stipulated, but then stated that he "would object to its admission in the first case as irrelevant". It is now insisted by counsel that it was not only relevant, but was absolutely essential. It is difficult to conceive of a clearer case of invited error.

In any event, there is ample authority that judicial notice could be taken of the facts as to which counsel assert there is failure of proof. Such facts appear without conflict in the record of the so-called second of the two consolidated cases. As to the fact of payment by Lawrence, there is not only the stipulation of counsel (Tr. 343 in 13840), but there is also the Notice of Payment of Judgment (Tr. 96-97 in 13840) and Assignment of Judgment. (Tr. 95-96 in 13840.) The fact that the judgment in favor of R. F. C. against Capitol and Lawrence was based upon that in favor of Defense Supplies against the same parties was pleaded in the complaint of R. F. C. (paragraphs VII and XII, Tr. 40-42 in 13840) and in Lawrence's cross-claim (paragraphs IV and VII, Tr. 56-59 in 13840) and was admitted by Capitol. (Paragraphs IV and VII, Tr. 67-68 in 13840.)

There are numerous cases both under California and Federal practice which permit the Court to take judicial notice of the facts here asserted to be unproven.

Schomer v. R. L. Craig Co., 137 Cal. App. 620, 627, 31 P. (2d) 396 (1934);

Christiana v. Rose, 100 Cal. App. (2d) 46, 52, 222 P. (2d) 891 (1950);

A. G. Reeves Steel Const. Co. v. Weiss, 119 Fed. (2d) 472 (C.C.A. 6th, 1941); cert. denied 314 U.S. 677, 86 L.Ed. 541;

Fletcher v. Evening Star Newspaper Co., 133 Fed. (2d) 395 (C.A., D.C., 1942);

Suren v. Oceanic S.S. Co., 85 Fed. (2d) 324 (C.C.A. 9th, 1936).

The rule is fully stated in the *Reeves* case (supra), at page 474:

> "The general rule is that a court will not go outside the record before it to take notice of the proceedings in another case even between the same parties and in the same court, unless such proceedings are put in evidence. National Surety Company v. United States, 9 Cir., 29 F. 2d 92; Paridy v. Caterpillar Tractor Company, 7 Cir., 48 F. 2d 166. The dictates of common sense and the demands of justice provide an exception to this rule that in order to reach a just result and bring an end to litigation, courts will make use of established and uncontroverted facts not formally of record in the pending litigation where such facts may be ascertained from an examination of the facts and pleadings in former cases in

> the appellate court between at least one of the parties and others relating to the same subject matter. 'The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it.' Dimmick v. Tompkins, 194 U.S. 540, 548, 24 S. Ct. 780, 782, 48 L. Ed. 1110."

And the District Court may take judicial notice under similar circumstances:

> "The controlling question raised on this appeal is whether a lower court, on a motion made for summary judgment, and in determining that there is no genuine issue as to any material fact, can take judicial notice of its own records in concluding the issue thus raised."
>
> "We take this to be too well settled to be seriously questioned. * * * Citing cases. * * *
>
> "Not only that, but it is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature between the same parties."
>
> *Fletcher v. Evening Star Newspaper Co.,* supra.

Counsel also suggest that payment by Lawrence to R. F. C. was a "voluntary act" not connected with the judgment in favor of Defense Supplies, because the judgment in favor of R. F. C. was not "final" within the meaning of Rule 54(b). No authority is cited for this remarkable proposition that an indemnitee may not recover from his indemnitor sums which the indemnitee has paid on a judgment against which he

was indemnified, solely because the judgment was not "final" for purposes of appeal. It may be noted here that the indemnitor (Capitol) was also a judgment debtor under that judgment and that counsel for Capitol approved it as to form. (Tr. 81-83 in 13840.)

The final artful suggestion on behalf of Capitol is that "*a* judgment" was filed dismissing Lawrence's cross-claim against Capitol in No. 30473 and that consequently Lawrence is estopped to assert Capitol's liability. The judgment so referred to is the consolidated judgment here appealed from (Tr. 131-134 in 13840), and the basis for the dismissal of one of Lawrence's two cross-claims is fully explained in the order for judgment (Tr. 30 in 13840) and in the conclusions of law. (No. III, Tr. 130 in 13840.) This ultimate refinement of counsel's technicality appears wholly frivolous.

B. THE POINTS RAISED ON BEHALF OF APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS, AND ALICE PHELPS.

I. APPELLEE LAWRENCE WAREHOUSE COMPANY WAS ENTITLED TO RECOVER FROM APPELLANTS KENYON, ADAMS AND THE PHELPS AS SUCCESSORS TO APPELLANT CAPITOL.

We pass now from the contentions raised on behalf of appellant Capitol to those raised in the separate brief filed on behalf of the other appellants. With respect to the first point raised we find ourselves in full agreement with counsel for appellants—if the judgment in favor of Lawrence against Capitol is

reversed on the merits, the judgment against the latter's successors (who assumed its liabilities) cannot stand.

The converse of this proposition is also true. If Lawrence was entitled to recover from Capitol, it was also entitled to recover from Capitol's successors in interest who assumed its liabilities. Counsel concede (as they must upon the admitted facts) that appellants Kenyon and Adams expressly assumed in writing the obligations of Capitol upon its dissolution, and that appellants Phelps are liable upon the assumption of Adams since it constituted their corporate alter ego. (Page 7 of Brief for Kenyon et al.)

It is to be noted that there is not one point raised in the brief filed on behalf of these appellants which goes to the substantive merits of their liability. It is now conceded that they are liable if Capitol is liable, but it is argued at length that alleged technical procedural errors should be held to deprive Lawrence of its otherwise just judgment. These alleged errors appear to be of an insubstantial character and must be considered in the light of the admitted facts and circumstances.

II. THE EVIDENCE SUSTAINS THE JUDGMENT, FINDINGS AND CONCLUSIONS IN FAVOR OF LAWRENCE AGAINST APPELLANTS KENYON ET AL.

Counsel devote the major portion of the brief filed on behalf of appellants Kenyon et al. (pages 16 to 42 thereof) to a lengthy and somewhat abstruse argu-

ment to the effect that no evidence was offered to show their liability to Lawrence. This argument is complicated and somewhat disorganized and consequently is difficult to deal with in an orderly and concise manner. It appears, however, from counsel's summary at the end of this section of their brief that they are relying upon three separate propositions:

> "From the foregoing analysis arise three independent and separate reasons why the judgment against these appellants must be reversed:
>
> 1. No evidence was offered or admitted against appellants to show a liability of Capitol to Lawrence.
>
> 2. Under the settled law of this court and the decisions of the State of California, appellants cannot be bound by the judgment or evidence against Capitol.
>
> 3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants." (p. 41-42 of Brief for Kenyon et al.)

Assuming these to be the points raised by counsel, we will deal with them in the order stated.

a. The evidence to sustain the judgment.

Apparently pages 16 to 25 and pages 38 to 41 of the brief filed on behalf of appellants Kenyon et al. are devoted to counsel's first stated point that there was no evidence to sustain the judgment for Lawrence against these appellants.

In considering this point, it must again be borne in mind that these appellants expressly assumed the liabilities of Capitol; it was so admitted in their answers to interrogatories and in the depositions (all in evidence) and is specifically conceded in their brief. The District Court, in its order for judgment indicated clearly that since judgment was being ordered against Capitol after a consolidated trial, that judgment was binding upon those who had assumed Capitol's liabilities:

> "James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution, they are liable for the amount of the judgment against Capitol." (Tr. 29 in 13840.)

Appellants now assert, first, that the judgment against Capitol was never offered in evidence against the other appellants and that the Court could not take judicial notice of it, and second that reliance upon it was never pleaded. Just how one could plead or offer in evidence in a consolidated action a judgment not yet rendered in that action is not clear to us. Appellants' assumption of Capitol's liabilities, including that to Lawrence, was fully set out in the pleadings (paragraphs VI and VII of cross-claim, Tr. 57-59 in 13840), and the effect upon appellants of a judgment against Capitol was fully discussed in the briefs in the District Court. Counsel now assert, without

citation of authority, that appellants Kenyon et al. have been deprived of their day in court because of failure to plead formally the effect of a judgment in favor of Lawrence against Capitol, a judgment not yet rendered but sought in the consolidated action. Moreover, this judgment, establishing Capitol's liability (among those expressly assumed by these appellants), would clearly be binding upon them and could not have been collaterally attacked. It is submitted that counsel's contention is specious.

The only authorities cited in this portion of the brief filed on behalf of appellants Kenyon et al. are purportedly directed to the contention that the Court could not take judicial notice as against these appellants of the judgment given simultaneously in a single document in a consolidated action against Capitol. *All* of the cases cited (at pages 19 to 23 of Brief for Kenyon et al.) involve former judgments or judgments at a former trial, and are simply not applicable. We have heretofore cited authorities (page 38 of this brief) directly contrary to those cited for appellants, but assuming the authority of the cases cited by appellants, they are still inapplicable here. Assuming that a judgment in a *former* action or at a *former* trial must be pleaded or offered in evidence at a later trial in order for the Court to take judicial notice of it for purposes of estoppel or res judicata, the situation here is quite different. Here the judgment was given by the District Court in the *same* document at the *same* time after a consolidated trial. Counsel

would have the District Court close its eyes to its own simultaneous and indivisible action. We submit that the authorities cited simply do not require such an anomalous result.

b. Appellants Kenyon et al. were in complete privity with Capitol and are bound by the judgment against Capitol.

In considering the next point urged by counsel (pages 25 to 35 of Brief for Kenyon et al.) we find ourselves in the realm of fantasy. It is here seriously urged that these appellants are not bound by the judgment against Capitol because they were not in privity with Capitol nor did they participate in Capitol's defense. Before considering the authorities cited, we wish to restate the undisputed facts as to the relationship of these parties.

At all times germane to this action (from October 1, 1942 until its dissolution) Capitol's sole and equal stockholders were appellants James A. Kenyon and Adams Service Co. (Tr. 107, 158 in 13840.) It is conceded by appellants that Adams Service Co. was the corporate alter ego of appellants F. Norman Phelps and Alice Phelps. (p. 7 of Brief for Appellants Kenyon et al.) The fire which destroyed the tires of Defense Supplies occurred on April 9, 1943. (Tr. 79 in 11418.) Capitol's Certificate of Election to Dissolve was signed on June 1, 1943 and filed with the Secretary of State on June 21, 1943. (Tr. 357 in 13840.) On May 31, 1943, Kenyon and Adams as sole stockholders of Capitol, in consenting to the dissolution, expressly agreed to assume and pay all of the debts,

liabilities and obligations of Capitol upon the transfer to them of its assets. (Tr. 162 in 13840.) On December 31, 1943, Capitol's Certificate of Winding Up and Dissolution was executed, but was not filed with the Secretary of State until June 5, 1944. (Tr. 358-359 in 13840.) (Defense Supplies' complaint was filed on February 16, 1944. (Tr. 3 in 13840).) *All* of the assets of Capitol were distributed equally to Kenyon and Adams at some date prior to June 5, 1944 (Tr. 108, 159 in 13840) and were immediately transferred to a limited partnership consisting of Kenyon and Adams, which continued Capitol's business (Tr. 159-161 in 13840). The limited partnership continued until the incorporation of Capitol Chevrolet Co. on April 10, 1946, at which time the assets were transferred to the new corporation, the stock of which was issued as directed by the partners. (Tr. 110-111 in 13840.)

It is perfectly clear from this that the present appellants were privies with Capitol in every sense of the word; there was privity of contract (they expressly assumed the liabilities); there was privity of estate (they succeeded to all the assets). It is also obvious that the appellants (having taken over all of the assets of Capitol) necessarily, actually and openly took over the defense of Capitol thereafter. In open court appellant Kenyon, on February 13, 1945, testified:

> "A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

Q. You are the owner of the Capitol Chevrolet Company?

A. Yes." (Tr. 354-355 in 13840.)

(It may be noted parenthetically that Kenyon overstated his interest; he was not *the* owner, he was a half owner with Adams.)

Appellant F. Norman Phelps in his deposition testified (in answer to a question concerning the new corporation):

"No, they (the new corporation) won't be responsible, but the people are the same, and I don't think there is any doubt in my mind as to whether or not if they lose the case the thing will be paid. I can assure you there has been nothing that has been done on any of these changes to do something to get rid of my liability. You can put that in the record." (Tr. 283 in 13840.)

And Mr. Phelps again:

"Q. You did know there was this litigation, however, as a result of this fire?

A. Definitely; knew that we had assumed the responsibility.

Q. You knew that?

A. That is right.

Q. You knew that when you took the position as President of Capital Chevrolet Company?

A. That is right; that is, the old company had responsibility; that is right.

Q. And that they had been assumed and that the litigation was still going on?

A. That is right." (Tr. 285-286 in 13840.)

Counsel for appellants at the pretrial conference stated as follows:

> "The Court. Let us protect your rights in this way: Would you stipulate that if the Capitol Chevrolet Company is determined to be liable that Kenyon would be liable under his agreement, subject to the validity of any defense he might have on the statute of limitations?
>
> Mr. Garrison (Counsel for Lawrence). Question of law.
>
> The Court. Just trying to save you gentlemen having to present proof.
>
> Mr. Archer (Counsel for Appellants). Yes, the contract is valid, no doubt about that." (Tr. 228 in 13840.)

> "Mr. Archer. One step has been skipped by Mr. Garrison and that is the stockholders of Capitol Chevrolet Company assumed the liabilities. There was no fraudulent transfers or anything. There was a contractual arrangement there. So I think that is the end of it. You have a perfectly valid transfer and an assumption of liabilities by the two stockholders.
>
> The Court. There is no question involved there. If you lose in this case, the judgment would have to go against these defendants.
>
> Mr. Archer. Yes, against Kenyon, and the only question is the statute of limitations." (Tr. 244 in 13840.)

In the face of these undisputed facts and testimony counsel have the temerity to assert that appellants Kenyon et al. were not in privity with or bound by the judgment against Capitol. The authorities cited

do not involve either (a) an express assumption of liabilities or (b) actual control of the litigation. Both of these factors exist here, and these appellants are not bona fide purchasers for value without notice, as counsel would apparently like to have the Court assume. The legal situation here is controlled, not by the authorities cited by appellants, but by such cases as:

Caterpillar Tractor Co. v. Int. Harvester Co., 120 Fed. (2d) 82, 139 A.L.R. 1 (C.C.A. 3rd, 1941);

Bates v. Berry, 63 Cal. App. 505, 509, 219 Pac. 83 (hearing S.Ct. denied) (1923);

Pann v. United States, 44 Fed. (2d) 321 (C.C.A. 9th, 1930).

c. The judgment is binding upon appellants regardless of form.

The third reason adduced by counsel in their effort to show that the judgment against Capitol was not binding upon the other appellants is that the judgment was not, under Rule 54(b), final for purposes of appeal. Two facets of this point are apparently presented, first, that the judgment was not final at the time of trial, and, second, that the judgment against Capitol (when entered) was not final because of the absence of an express determination by the District Court under Rule 54(b) that there was no just reason for delay.

There would appear to be several answers to these contentions. First, there is no showing that the judgment in question was not final under Rule 54(b).

Second, assuming that the judgment was not final for purposes of appeal under Rule 54(b), it is still binding upon these appellants, either by way of *res judicata* or because of their express assumption of Capitol's liability. And third, assuming that the judgment was not final and not binding by way of *res judicata,* it was still evidence of a liability of Capitol and the District Court's finding upon evidence is conclusive on appeal.

As we have previously pointed out, the District Court in its Order for Judgment did make an express direction for entry of judgment (Tr. 29 in 13840) and the docket entry refers to the filing of a final judgment (Tr. 6 in 13840). The judgment in the consolidated cases was a single one (Tr. 131-133 in 13840), and the *nunc pro tunc* Order Pursuant to Rule 54(b) refers to that judgment, although entitled by counsel only in one action (Tr. 179 in 13840). (It may be noted that this is not the only document entitled by counsel in only one of the two numbered actions and filed on behalf of cross-defendants in both actions; for example, the brief filed on behalf of all cross-defendants was entitled in action No. 23171 alone. (Tr. 439-440 in 13840).) It is apparent that the judgment referred to may well be final, even for purposes of appeal under Rule 54(b).

Assuming, however, that the judgment was not final for purposes of appeal under Rule 54(b), it is clear under the authorities that it was still binding upon these appellants who expressly assumed Capitol's

liabilities. A judgment not final in form is still *res judicata* if in fact it determines the issues and settles the controversy.

Miller Saw-Trimmer Co. v. Cheshire, 1 Fed. (2d) 899 (C.C.A. 7th, 1924);

Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co., 71 Fed. Supp. 111 (D.C. N.D. Cal. N.D., 1947);

Sewerage Comm. v. Activated Sludge, 81 Fed. (2d) 22 (C.C.A. 7th, 1936);

Larkin Auto. Parts v. Bassick Mfg. Co., 19 Fed. (2d) 944 (C.C.A. 7th, 1927).

Furthermore, these appellants expressly assumed the liabilities of Capitol and are in the same position as sureties. (*California Civil Code,* Section 2787.) Under familiar rules such a surety is bound by the judgment regardless of form, either as an exception to the strict *res judicata* rule or by a "fair and reasonable interpretation of the contract".

Kruger v. Calif. Highway Indmn. Exch., 201 Cal. 672, 257 Pac. 602 (1927), cert. denied 275 U.S. 568, 72 L.Ed. 430.

The only authority cited by counsel to sustain their position is *Merriam v. Saalfield,* 241 U.S. 22, 60 L. Ed. 868 (1916). The case is clearly distinguishable here, since the judgment there involved was interlocutory in substance as well as in form. Furthermore, there was not there involved any express assumption of the liabilities, as there is in the case at bar.

Lastly, assuming the nonfinality of the judgment and assuming further that it was not binding by way of *res judicata* or otherwise upon these appellants, still such a judgment is evidence of a liability of Capitol, and these appellants assumed Capitol's liabilities. Such evidence is sufficient to sustain the District Court's findings.

Lake County v. Mass. Bonding & Ins. Co., 84 Fed. (2d) 115 (C.C.A. 5th, 1936);

Lake County v. Mass. Bonding & Ins. Co., 75 Fed. (2d) 6 (C.C.A. 5th, 1935);

38 *C.J.S.* 1262-1263.

It is submitted that the judgment against Capitol is binding upon these appellants regardless of any purely formal technical objections thereto, and that counsel's strictures upon it are without substance. Counsel's disapproval of the judgment as to form was placed upon entirely different grounds (Tr. 133 in 13840), and the present attack is without merit.

III. THE CONTENTIONS RESPECTING LAWRENCE'S CONTRIBUTORY NEGLIGENCE, ETC.

The third and fourth points urged on behalf of appellants Kenyon et al. (pages 42 to 50 of Brief for Kenyon et al.) are based upon a wholly false premise. It is here urged (as it was on behalf of appellant Capitol) that Lawrence was itself negligent, both on the evidence and because of the language used in the judgment in favor of Defense Supplies. These ques-

tions were disposed of previously in this brief, but are here asserted by the appellants other than Capitol. These appellants expressly assumed the liabilities of Capitol, and since the latter's liability to Lawrence was established by the judgment in favor of Lawrence against Capitol, these appellants would not appear to be in a position to urge these defenses here. The defenses were asserted by Capitol unsuccessfully and that determination forecloses the same questions being raised again by those who assumed Capitol's liabilities.

The substance of Lawrence's claim against these appellants was that they assumed Capitol's liabilities. The assumption is conceded by counsel, and the liability was established by the judgment in favor of Lawrence against Capitol. Counsel's present arguments are without foundation and have in any event been disposed of herein in considering the same contentions raised by Capitol.

IV. LAWRENCE'S CROSS-CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

In the answers filed by counsel for appellants six separate statutes of limitation were pleaded by way of special defense. Reliance is now placed upon only one of these and that only by way of alleged "anticipatory breach". (Pages 50-52 of Brief for Kenyon et al.) The present argument omits any reference to the date upon which Lawrence was compelled to pay Re-

construction Finance Corporation. That judgment was paid on December 1, 1951 (Tr. 97, 343, in 13840), so that the cross-claims obviously were filed well within any limitation period. Counsel assert, however, that the cause of action was accelerated because of an "anticipatory breach by repudiation".

This point would appear to be disposed of by counsel's concession that "the cause of action is accelerated only at the option of the indemnitee" (Lawrence). (Page 51 of Brief for Kenyon et al.)

The authorities cited do no more than indicate that Lawrence, under the Federal Rules of Civil Procedure relating to cross-claims, *could* have brought in these appellants at an earlier date if it had been aware of them and had desired to do so. None of the authorities support the unusual position of counsel that Lawrence, under the penalty of the statute of limitations, was *compelled* to do so at an earlier time. The statute of limitations on a suit by an indemnitee against its indemnitor (and those who assumed the latter's liabilities) commences to run when the indemnitee suffers a loss (as here by payment to Reconstruction Finance Corporation). No authority is cited to support the argument that because the indemnitee *could* bring an earlier action on a contingent claim he *must* do so or be barred by the statute.

V. LAWRENCE'S LOSS AND DAMAGE.

The last point urged by counsel on behalf of appellants Kenyon et al. (pages 52-53 of Brief for Kenyon et al.) demonstrates the lack of merit in this appeal. Here, without any supporting authority, it is argued that Lawrence proved no loss or damage by paying the judgment in favor of Reconstruction Finance Corporation, because that judgment was not final for purposes of appeal under Rule 54(b)! It is not disputed that that payment was made; it was so stipulated (Tr. 343 in 13840) and the District Court so found (Tr. 123 in 13840). It is merely asserted that the indemnitee (Lawrence) suffered no loss or damage because the judgment which it paid was not final as to form for purposes of appeal. For rather obvious reasons no authority is cited for this remarkable position, and it need not be seriously considered here.

CONCLUSION.

It is respectfully submitted that the present appeal is wholly devoid of merit. No serious effort has been made on behalf of any of the appellants to demonstrate that Lawrence as principal was not entitled to indemnity from its agent Capitol (and the latter's successors who assumed its liabilities) for loss incurred by Lawrence on account of its agent's negligence. Counsel's ingenuity has offered to this Court innumerable charges of procedural error on the part of the District Court, none of which appear upon

examination to be of any substance. It is submitted that the District Court's determination was proper and that the judgment must be affirmed.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

As pointed out on page 31, subdivision III of this brief, we deemed the answer to appellants' asserted defense of *res judicata* so legally impotent and transparent that it might be disposed of by the terse comments presented in such subdivision. This Court will have occasion to burden itself with the following pages only if it deems a more amplified discussion of value.

Counsel's presentation of the *res judicata* point is primarily based upon three cases inexactly cited as involving a situation which did not in fact exist in such cases and one case which is clearly distinguishable. As to the three cases:

On page 55 of appellants' brief on behalf of Capitol it is stated:

> "* * * the California cases which permit action over by a principal against an agent *in the same action in which they are sued by third persons,* hold the parties to be estopped by the record in that action."

First cited for the above proposition is:

Salter v. Lombardi, 116 Cal. App. 602, 3 P. 2d 38 (1931).

There was no cross-complaint by any principal against any agent in that lawsuit.

Next cited by appellant is:

Bradley v. Rosenthal, 154 Cal. 420, 423, 97 Pac. 875 (1908).

Again, there was no cross-complaint by any principal against any agent in the lawsuit.

Next cited by appellant as authority for its extraordinary statement is:

> *Adams v. White Bus Line,* 184 Cal. 710, 713, 714, 195 Pac. 389 (1921).

For the third successive time counsel for appellant Capitol has cited to this Court as a case in which a cross-claim or cross-complaint was permitted "in the same action in which they are sued by third persons," *a decision in which there was no cross-claim or cross-complaint whatsoever.*

They cite no other cases but again in their separate brief on behalf of Kenyon, Adams and the Phelps, they refer to these three cases which do not involve any situation of cross-claims or cross-complaints as conclusive.

This Court has before it a case where *cross-claims were filed* in both 23171 and in 30473. It has a case before it in which the trial judge reserved jurisdiction to hear the cross-claims after its decision in the first hearing on the complaint of Defense Supplies and the answers of various defendants in 23171. It has before it a matter in which but for purely technical reasons its own prior opinion that Lawrence could be held only upon the principle of *respondeat superior* would be the law of the case warranting a summary judgment on the cross-claims against Capitol and those who succeeded to its property and assets.

In all such cases the California Courts have rejected the plea of *res judicata.*

Next pressed upon this Court as apposite is the decision in

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

wherein a plaintiff in a subsequent case concerning the same subject matter was held bound by the determinations of the Court upon the same facts in a prior lawsuit. The case did not involve a continuing piece of litigation wherein the trial Court did not decide a particular matter at issue and reserved it for determination at a subsequent hearing. That is the situation now before this Court. And the decision in *Bernhard v. Bank of America,* supra, cited on page 55 (Capitol brief) and on page 44 (brief Kenyon, et al.) is in no way out of harmony with the manner in which the trial judge resolved appellants' technicality nor is it out of harmony with other decisions of the Appellate Courts of California in which facts and circumstances were pertinent to those here under review.

In

Hall v. Coyle (1952), 38 Cal. 2d 543, 241 P. 2d 257,

plaintiff alleged defendant had agreed to pay plaintiff for the alleged *negligent* destruction of a house. The answer denied the agreement and the *negligence.* Trial was had and defendant prevailed. Plaintiff then brought suit (not on the promise to pay for the destruction of the house) but for the *negligent* destruction thereof. The trial Court's judgment for plaintiff in the negligence case was affirmed despite

the plea of *res judicata.* The Supreme Court did not look narrowly to the judgment and the pleadings, nor did it confine its inquiry to such records and the findings of fact and conclusions of law in the first cause. The Supreme Court examined the entire record and found that the issue of *negligence* had been withdrawn from consideration in the first action and, therefore, properly held that it was open for contention, successful as to the plaintiff.

This Court is not required to go as far. The trial judge here had before it the same proceeding at a more advanced stage in a case in which the liabilities of cross-defendants *inter se* had not only not been adjudicated but expressly reserved for future final determination.

The trial Court retained jurisdiction to decide the cross-claims and has now, in fact, determined them on their merits. Such procedure was entirely proper. Had the efforts of defendants to reverse the holding of the trial judge on the complaints and answers been successful, there would have been no need to consume further time.

See:

Stark v. Coker, 20 Cal. 2d 839, 129 P. 2d 390 (1942);

United Bank & Trust Co. v. Hunt, 18 Cal. App. 2d 112, 62 P. 2d 1391 (1936).

There is not the slightest question but that where an issue is undecided even in a *prior* litigation, or is withdrawn from consideration therein, the Courts will

not apply the doctrine of *res judicata.* A joint and several judgment in favor of Defense Supplies Corporation was entirely proper since Capitol was the agent of Lawrence in the performance of duties undertaken by Lawrence for Defense Supplies. Obviously enough, Lawrence could not absolve itself from the consequences of its agent's fault.

Johnson v. Monson, 183 Cal. 149, 190 Pac. 635 (1920).

Even assuming that Lawrence had awaited decision against it on the complaint of Defense Supplies and then pursued its agent in a separate suit, the Court could look behind the joint and several judgment and find that it was based upon imputed negligence.

California Code of Civil Procedure, Section 1911;

Treece v. Treece, 125 Cal. App. 726, 14 P. 2d 95 (1932);

Watson v. Lawson, 166 Cal. 235, 135 Pac. 961 (1913);

Phipps v. Superior Court, 32 Cal. App. 2d 371, 375, 376, 89 P. 2d 698 (1939) (hearing S. Ct. denied);

Porello v. United States, 153 F. 2d 605 (2d Cir., 1946);*

Larson v. Barnett, 101 Cal. App. 2d 282, 225 P. 2d 295 (1950).

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*Subsequent proceedings in the above case, 330 U.S. 446, 91 L. Ed. 1011 and 94 Fed. Supp. 952, 955 (S.D. N.Y. 1950) do not affect the integrity of the holding.

No issue of cross-claims was involved in the case of

Benson v. Southern Pacific Co., 177 Cal. 777, 171 Pac. 948 (1918),

cited variously on pages 22, 51 and 53 of the brief for Capitol. There the railroad and its engineer were sued in one action. No cross-complaint was filed against such engineer. The jury brought in a verdict which was silent as to the engineer but gave the plaintiff a judgment against the railroad. In the hope of reversing the case upon the technical ground that a verdict absolving the agent cannot stand against the inactive principal whose negligence is imputed, the railroad counsel made no objection in the trial Court but appealed. The Supreme Court held that the railroad's negligence had been established at the trial and affirmed the judgment stating that "a verdict of the jury against one of two defendants is not a verdict in favor of the other defendant."

What pertinency that decision has to any aspect of this litigation is not apparent to us but in view of counsels' repeated citation thereof, we did not wish to leave it unnoticed.

Another case presenting the converse situation and twice cited by appellant Capitol (Brief pages 51 and 54) is

Fimple v. Southern Pac. Co., 38 Cal. App. 727, 177 Pac. 871 (1918).

Again no cross-claim was made by the railroad against its engineer. Since the complaint charged negligence on the part of the engineer *only,* the Appellate Court

held that the verdict of the jury against the railroad alone could not be upheld. Plainly such case is of no significance here either in any factual, procedural or other aspect.

The various cross-defendants below, however, did stand in precisely the same relations one to another as did the several defendants in

Molen v. Bussi, 118 Cal. App. 482, 483, 5 P. 2d 450 (1931).

In such case Molen, the plaintiff, and one Kennedy had been partners in the garbage business. Molen bought out Kennedy's interest and subsequently sold out to the Bussis for $200.00 cash and a note for $1300.00. Such note was the basis of Molen's action. Prior thereto Kennedy had asserted a claim to the business and sued the Bussis. Molen was made a defendant in such action and filed a cross-complaint against his co-defendants, the Bussis, upon the $1300.00 note. Upon objection of the Bussis that the cross-complaint in the action was not a proper subject for cross-complaint, the trial Court excluded it from consideration. Nevertheless, such Court made a finding thereon "that none of the allegations set forth in the cross-complaint filed by Molen were true."

The foregoing finding was asserted in the instant case as *res judicata.* In rejecting the plea the Court stated:

> "The plea invoked (res judicata) is a bold attempt to defeat the payment of an honest obligation." (p. 483.)

* * * * * * *

> "Where the matter is pleaded as a setoff or counterclaim * * * and is excluded and not taken into consideration in rendering judgment an action may afterward be maintained thereon." (p. 484.)
>
> "Where a former adjudication is pleaded it must appear that the adjudication was on the merits." (p. 485.)

Patently as in *Molen v. Bussi,* there had been no adjudication on the merits of the cross-claim until they were actually heard (the present phase of this proceeding). Likewise, as in said case, the question of cross-claims as we have repeatedly pointed out was excluded from consideration and reserved for determination with the consent of all parties when the Defense Supplies phase of the case was litigated.

The California Courts have vigorously resisted what is here sought to be accomplished, to wit: *An unconscionable use of the plea of res judicata to avoid a just obligation.*

Hall v. Coyle, supra;
Treece v. Treece, supra;
Molen v. Bussi, supra.

In all such cases the "judicial record" (a term used repeatedly by appellants' counsel without definition) has included in its scope the examination of all that transpired in the former litigation to avoid a miscarriage of justice due to technicality and to proclaim truth and expose falsity.

In

Tanaka v. Highway Farming Co., 76 Cal. App. 590, 245 Pac. 434 (1926),

it is held that even an express finding in a prior litigation in which the present plaintiff and defendant were co-defendants, that one was not entitled to indemnity from the other was not sufficient to justify the invocation of the rule of estoppel by judgment or *res judicata.* See also:

Standard Oil Co. v. J. P. Mills Organization, 3 Cal. (2d) 128, 140, 43 P. (2d) 797 (1935).

The foregoing authorities are but routine applications of the rule that: "As between co-defendants, nothing is adjudicated by a joint judgment against them." (33 *Corpus Juris,* p. 1131.)

While this question might be endlessly explored, amplified and re-enforced by citation of authorities in other jurisdictions, nevertheless, feeling as we do that the matter is completely answered in Section III of our brief, we feel it appropriate to bring this discussion to a close.